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IN THE SUPREME COURT OF THE STATE OF UTAH

FRED BAUGH and GRACE H. BAUGH, *Plaintiffs and Appellants,*

vs.

WAYNE D. CRIDDLE, State Engineer of the State of Utah, *Defendant and Respondent,*

LOGAN RIVER WATER USERS' ASSOCIATION, *Intervenor.*

Case No. 10786

APPELLANTS' BRIEF

Appeal from the Judgment of the First Judicial District Court for Cache County Honorable Lewis Jones, Judge

E. J. Skeen
522 Newhouse Building
Salt Lake City, Utah
Attorney for Appellants

Dallin W. Jensen
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

David R. Daines
442 North Main
Logan, Utah
Attorney for Intervenor

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IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.	
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LOGAN RIVER WATER USERS' ASSOCIATION, *Intervenor.*	

APPELLANTS' BRIEF

STATEMENT OF KIND OF CASE

This is a suit for a judgment declaring the validity of the plaintiffs' decreed water right.

DISPOSITION IN LOWER COURT

The trial court determined that the water right in question was forfeited.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek an order reversing the judgment of the district court, and directing the entry of a judgment declaring that the water right in question is valid.

STATEMENT OF FACTS

In 1946, the Logan Flour Mills was the owner of water right No. 228 with a priority of 1860 awarded in a decree of the District Court of Cache County in the case of Utah Power and Light Co. v. Richmond Irrigation Co. dated February 21, 1922. The right was for a flow of 87 second feet of water from the Logan River for use for power purposes in the old Thatcher flour mill in Logan. The mill burned down in January, 1946 and the use of water for power purposes ceased. On February 15, 1950 an application for extension of time within which to resume use of water was filed in the State Engineer's Office. See Defendants' Exhibit 3. This application, No. 38, was approved and the applicant was given until and including January 1, 1955 within which to resume use.

By a deed dated May 9, 1950 the mill and the water right were conveyed by Logan Flour Mills, a corporation, to Crowther Bros. Milling Co., a corporation. See Exhibit 3. Later the property including the water right was conveyed to plaintiffs in this action. See Plaintiffs' Exhibit 1. It was stipulated at the trial that the plaintiffs are the owners of the water right, if it is still in existence. (Tr. 3)

On November 19, 1954, the successor to the water right, Crowther Bros., wrote to the State Engineer a letter as follows:

"Joseph M. Tracy 11-19-1954
State Engineer
Salt Lake City, Utah

Dear Sir:

We refer to the letter sent to Logan Flour Mills on 10-27 regarding the Water power in their name.

Perhaps you have *allready* been informed that they transferred this land and Water power rights to us some time ago, and it looks like we are *yo* be responsible for it.

For your information we have made a contract for the sale of the electric power which we are now building to materialize.

The new machinery has *peen* purchased and is now on its way and we are setting up the necessary building for housing the machinery.

The whole job should be ready for the first of the year or before. However in view of the fact that we are doing this work and making steps to put this power into beneficial use, we are wondering if it is sufficient proof in case we should be a few days late in actually *gererating* the power?

We have been paying our assessments with the Water users association and of course part of the stream is now running through the water wheel.

You also realize that the canal supplying the water must be used to supply water for other

interests further down stream. It is also used through this canal for irrigation.

In our opinion the fact that we are actually taking steps toward *gererating* this power, it would constitute sufficient proof of use.

Would appreciate your suggestions, if further requirements are necessary.

Yours very truly,

CROWTHER BROS MILLING CO
/s/ M. W. Crowther"
(See Defendant's Exhibit 3)

On November 30, 1954, the State Engineer replied, stating:

"Crowther Brothers Milling Company
Malad City, Idaho

RE: Extension of Time to Resume Use #38

ATTN: M. W. Crowther
Dear Sir:

In reply to your letter of November 19th in which you assume that your intention to resume use of the water shown in water right #228 of the Kimball Decree at an early date would be sufficient evidence of resumption of use, this is to inform you that unless evidence is supplied this office on or before January 1, 1955 that this water has actually been put to use again or that you file a new request for extension of time in which to resume use this water right will revert to the public. The fact that you have purchased new machinery and are building new facilities is not sufficient evidence that the resumption of use has been effected. Neither is the fact that the water is going through your canal or through the power

wheel sufficient evidence for the reason that there are numerous rights diverted through this canal all of which of necessity must pass through the canal and through the power wheel and unless you are developing power as set up in the Decree the resumption of use has not been accomplished.

If you can on or before January 1, 1955 furnish an affidavit showing that the water involved in water right #228 of the Kimball Decree is actually in use and also show by a water measurement that the water is being used for power purposes and being returned to Little Logan River at a point described in the Decree it will be considered that you have resumed use. However if it is impossible to get the water back into use again before said date it would be necessary for you to file another request for extension of time in which to resume use. Before you can file such a request it will be necessary for you to show your ownership of water right which at present is in the name of the Logan Flour Mills Incorporated.

I am enclosing an application form on which you may make such filing for extension of time. The cost of filing this application will be $159.00 filing fee and an advertising fee of $20.00 making a total of $179.00. I trust this clears the matter up for you and you will take the necessary precautions to maintain your water right.

Very truly yours,

Joseph M. Tracy
STATE ENGINEER.

Encl: Extension of Time Application.

LCM/tic"

(See Defendant's Exhibit 3)

On December 29, 1954, Crowther Bros. again wrote to the state engineer as follows:

"Joseph M. Tracy
Office of the State Engineer
State Capitol
Salt Lake City, Utah

Dear Sir:

We refer to our recent correspondence regarding the extension of time for beneficial use of our water right which, as you know, is the old Thatcher mill property in Logan.

For your information, we wish to advise that the electrical equipment has all been installed and will be utilizing all the available water in the generating of electrical power for beneficial use. This will be actually running on the thirtieth.

For your information, also, we have entered into an Agreement to sell this electrical energy to Logan City so they will have the work of placing the water into beneficial use and this has actually taken place.

This will eliminate the necessity of asking for an extension of time to resume the use of the water.

The following is the description of the deed which we hold which was given to use by the Logan Flour Mills four years ago.

(Land description)

Trusting this will be sufficient evidence of beneficial water use, we are

Yours very truly,

CROWTHER BROTHERS
MILLING COMPANY
/s/ N. W. Crowther
By N. W. Crowther

NWC:ss"
(See Defendant's Exhibit 3)

The state engineer's file shows that on January 8, 1955, an assistant attorney general wrote a letter to Crowther Bros. reviewing the correspondence and stating:

> ". . . The blank form above referred to was not sent to you and the 'further information' mentioned in the statute could not be required of you; but the 'verified statement' and 'the date on which use of the water was resumed' are mandatory under the statute. Your letter cannot be considered a verified statement and it does not purport to show that the water was used but only that it would be used. In addition, we must comment on the fact that the applicant in this case was the Logan Flour Mills and no competent evidence of transfer of this application to your company has been submitted. . . ."

On February 10, 1955, Crowther Bros. filed on the State Engineer's form a duly verified formal proof of resumption of use stating that beneficial use of water through the restored flour mill and generator had been resumed within the extension period. By a letter addressed to both Logan Flour Mills and Crowther Bros. Milling Co. dated February 17, 1955, the state engineer declared that the water right in question "has terminated for the reason that it has been lost by nonuse, and that

the water has reverted to the public." The formal proof of resumption of use was returned. See Defendant's Exhibit 3.

Soon thereafter Crowther Bros. filed a new application to appropriate water which was approved for 71.5 second feet. See Exhibit 4.

At the trial it was stipulated that the new power generator had been completely installed in the mill during the month of December, 1954, and that power generated by the plant was placed in the Logan City line on December 30 and 31, 1954, under a contract between Crowther Bros. Milling Co. and Logan City. (Tr. 3) Mr. Crowther testified that on the date indicated above sixty to sixty-five second feet of water went through the generator. That was all of the water of Logan River available for such purpose. (Tr. 6) This testimony is not contradicted.

It should be noted that the only parties to the controversy over the alleged forfeiture of the water right were Crowther Bros. and the state engineer. Although the Logan River Water Users' Association intervened in this case, there is no evidence that it is the owner of any water right on the Logan River. No water user appeared or introduced any evidence. There is no finding of fact as to any water right except the one claimed to have been forfeited. This is a contest only between the plaintiffs and the state engineer.

The trial court made findings of fact, stating briefly, the substance of the state engineer's file and the corres-

pondence between Crowther Bros. The state engineer then made one conclusion of law as follows:

> "1. That since an appeal was not taken within the sixty days allowed by Section 73-3-14, Utah Code Annotated, 1953, the applicant and his successors are foreclosed from seeking a review of the State Engineer's decision of February 17, 1955, rejecting proof of resumption of use for Award No. 228." (R. 41)

The judgment was as follows:

> "... NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the water right evidenced by Award No. 228 in the case of Utah Power & Light Company vs. Richmond Irrigation Company, et al, Civil No. 1772, Cache County, is forfeited and plaintiffs have no right to the use of water under said award." (R. 42)

STATEMENT OF POINTS

1. The decision of the state engineer declaring a forfeiture was absolutely void.

2. Failure to file a timely action for review of the state engineer's decision does not prejudice the plaintiffs' right to relief in this case.

3. Use of water was actually resumed within the extension period, and the trial court erred in declaring a forfeiture.

ARGUMENT

1. THE DECISION OF THE STATE ENGINEER DECLARING A FORFEITURE WAS ABSOLUTELY VOID.

Section 73-1-4, UCA, 1953, provides in part as follows:

> "When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public, and may be again appropriated as provided in this title. . . ."

The section permits a water user who is not using the water to which he is entitled to obtain extensions of the five-year nonuse period by filing an application for extension with the state engineer and obtaining his approval thereof. This section requires the state engineer to give sixty-days' notice of the expiration of the extended period and authorizes the engineer to receive a verified proof of resumption of use on a blank form to be furnished by him.

It should be noted that the statute does not authorize the state engineer to fix the time when a nonuse period begins to run and does not authorize the engineer to declare a forfeiture of a vested right. The office of state engineer was created by statute and his powers and duties are administrative and extend no further than the statute provides. United States v. District Court, 121 Utah 1, 238 P.2d 1132; American Fork Irrigation

Co. v. Linke, 121 Utah 90, 239 P.2d 188. The legislature did not intend to vest judicial functions in the state engineer.

When the state engineer made his decision declaring that the valuable decreed right with a priority of 1860 had been forfeited by nonuse, he acted entirely without jurisdiction for two reasons: (1) he performed an act not authorized by Section 73-1-4, and (2) he performed a judicial function in violation of the Constitution of Utah. These points will be discussed in the order stated.

The last paragraph of Section 73-1-4 provides:

> ". . . Sixty days before the expiration of any such period of extension of time, the state engineer shall notify the applicant by registered mail of the date when such period of extension will expire. Before such date of expiration such applicant shall file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and such further information as may be relevant and be required by the blank form which shall be furnished by the state engineer for said purpose, or such applicant shall make application for further extension of time in which to resume use of the water as provided in this section, otherwise such water right shall cease and thereupon the water shall revert to the public."

It is clear that this paragraph contains but two types of provisions: (1) a direction to the state engineer to perform certain administrative acts including the

sending of a notice of expiration of the nonuse period, and (2) the receiving for filing of written proof of resumption of use and applications for further extension. There is no provision permitting the state engineer to declare a forfeiture of a vested property right.

The last clause in the paragraph,

> "otherwise such water right shall cease and thereupon the water shall revert to the public,"

is a statement of substantive law as a guide to a court, but does not expressly or by implication authorize the engineer to decide whether a water right has been forfeited. There is no provision for the holding of a hearing to determine the facts from which it could be determined whether a water right should be declared forfeited. Indeed, if the statute had authorized the state engineer to make findings of fact and draw conclusions of law, and to determine that a vested property right no longer exists, it would have been delegating to an administrative officer duties, powers and jurisdiction vested in the court and would be unconstitutional.

Article VIII, section 1, of the Constitution of Utah provides:

> "The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

That the legislature did not intend to authorize the state engineer to take any action which would permit him to interfere with vested rights confirmed by the Constitution is made abundantly clear by this Court in the case of Eden Irrigation Co. vs. District Court, 61 Utah 103, 211 P. 957. I quote:

> ". . . It is, however, also contended with much vigor that the act permits the engineer to interfere with vested rights, in that he may interfere with water rights that have been adjudicated and fixed by the court, etc. A complete answer to this contention is found in the act itself. The italicized portion of section 32 expressly provides that where the rights to the use of water from a stream or body of water have been adjudicated 'said water shall be distributed in accordance with such decree until the same be reversed, modified, vacated or otherwise legally set aside.' There is, therefore, not even a semblance of a right given to the engineer to interfere with adjudicated or so-called vested rights. . . ."

The case of Fairbanks vs. Hidalgo County (Texas), 261 S.W. 542, is in point on the law and the facts. In that case an application was filed with the Texas Board of Water Engineers to have certain vested water rights cancelled of record becouse of abandonment and forfeiture. The Board of Water Engineers denied the petition for the reason that it had no authority to perform judicial acts. The case was appealed to the court and affirmed. The decision was again affirmed in the Supreme Court which stated:

> "It is also contended that where the facts establish an abandonment or failure to complete the project under the application that the board (Board of Water Engineers) ought to and can be made to cancel and annul the appropriation in a proper proceeding by the courts. To authorize such procedure on the part of the board would clearly authorize complaints involving these statutory matters to be loged with it . . . to determine vested rights . . . and by written decision forfeit and cancel the appropriation; which acts would involve every act of a legally constituted court in hearing and determining a cause before it. To permit this procedure and grant appellants prayer to compel the board to cancel and hold for naught the various appropriations of appellees canal company and district would in effect deny them their constitutional right . . . of a judicial determination of their vested rights as appropriators of water.
>
> * * *
>
> For the same reason we are of the opinion that the board has no authority whatever to hear and determine the question of whether or not appellants' land and water rights have been condemned in a proceeding for that purpose as provided by law. This is clearly a judicial matter, and can only be determined by a legally constituted court."

The question as to whether a water right is lost by nonuse necessarily involves matters of fact and law which are often complex and difficult. These include such questions as (a) the reasons for the nonuse of water, (b) whether the nonuse was voluntary or was caused by a flood, fire or other things beyond the control of the water user, (c) when the nonuse period commences.

(d) whether there has been reasonable effort to resume use, (2) when actual beneficial use is resumed and (f) the functions of the administrators and the courts.

In this case the state engineer apparently assumed that the water right was lost by nonuse because the applicant for extension of time did not file a *verified* proof of resumption of use within the time given, regardless of the facts as to the cause of nonuse and actual resumption. The evidence is clear that the Logan Flour Mill did not voluntarily cease using the water. It was forced to stop using it by the fire. Did the nonuse statute start to run against the water right as soon as the embers of the fire cooled? If not, when did it start to run?

The cases hold that a forfeiture of a water right under the statute does not require "intent to abandon," but they all hold that the nonuse must be *voluntary*. Rocky Ford Irrigation Company v. Kents Lake Reservoir Company, 104 Utah 202, 135 P.2d 108; Morris v. Bean, 146 F. 423, Ramsay v. Gottsche, 51 Wyo. 516, 69 P.2d 535; New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 77 P.2d 634; Scherck v. Nichols, 55 Wyo. 4, 95 P.2d 74; and Horse Creek Con. Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P.2d 572. The cases also hold that forfeitures of water rights are not favored and that a statute providing for forfeitures must be strictly construed. 93 C.J.S. 998.

The evidence in this case does not disclose a voluntary failure to use water.

It apparently did not occur to the state engineer that perhaps the application for extension of time should not have been filed in the first place. Because the nonuse was caused by a catastrophe and was not voluntary there may well have been no reason for filing for an extension. Is there anything in the statute to the effect that by filing for an extension the applicant waives all of his right to contest the forfeiture of his water right on equitable and legal grounds? Obviously not. Yet without giving proper notice, without having a hearing of any kind, and without affording an opportunity to present facts, the state engineer improperly assumed the power exclusively delegated to the court and declared that a decreed right having an 1860 priority was forfeited. In utter disregard of due process he in effect amended a court decree. We challenge the respondent to cite any statutory or other authority for such unwarranted usurpation of judicial power and authority.

The statute, Section 73-3-1, permits the water user to file for an extension of time to avoid the harshness of its operation. Under some circumstances the period of five-year nonuse is exceedingly short. The statute does not say, expressly or by implication, that by filing an application for extension the applicant exposes his priority right to forfeiture by action of an administrative officer. As indicated above forfeiture statutes must be strictly construed to safeguard valuable property rights. The attempted declaration of forfeiture was absolutely void.

2. FAILURE TO FILE A TIMELY ACTION TO REVIEW THE STATE ENGINEER'S DECISION DOES NOT PREJUDICE THE PLAINTIFFS' RIGHT TO RELIEF IN THIS CASE.

The trial court made only one conclusion of law which is quoted above on page 9. That conclusion was that since an appeal was not taken from the state engineer's decision within sixty days, the applicant and his successors are foreclosed from now seeking a review of that decision. The conclusion of law completely misses the point. This action was filed for a judgment declaring the validity of a decreed water right. It was not filed to review a decision of the state engineer. There is no reason for appealing from a decision which is not only erroneous, but which is absolutely void.

What is the effect of the state engineer's decision purporting to forfeit the water right? Did he merely commit error which would stand unless reversed by the district court, or was his decision absolutely void? The law is that if an administrative officer or a court proceeds to act without jurisdiction, the act is ineffectual for all purposes. It is null and void from the beginning and no legal right can be predicated upon it.

In 67 C.J.S., sec. 103, p. 371, the rule is stated as follows:

> "Powers conferred on a public officer can be exercised only in the manner and under the circumstances prescribed by law; and any attempted

exercise thereof in any other manner or under different circumstances is a nullity."

See also, City of San Pedro v. City of Richmond, 306 P.2d 949, 148 Cal. Appls. 2d 358; Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60; Bear River Sand and Gravel Corp. v. Placer County, 258 P.2d 543.

3. USE OF WATER WAS ACTUALLY RESUMED WITHIN THE EXTENSION PERIOD, AND THE TRIAL COURT ERRED IN DECLARING A FORFEITURE.

The evidence is clear and counsel for the defendant and intervenor admitted that the power generating equipment was installed, the water was used, and the power went into the Logan City lines within the extension period. (Tr. 3) What then was the reason for the State Engineer's attempted declaration of forfeiture? He took the position that he should not look at the substance, namely, the actual beneficial use of water, but to the form of the document advising the state engineer of the resumption of use. The engineer said that because the letter reporting resumption of use was not on the state engineer's form and was not verified, the 1860 priority water right should be declared forfeited.

We submit that the legislature did not intend any such result. The engineer obviously should have permitted transfer of the proof to the proper form. To declare a forfeiture under these facts was not only beyond the intent of the statute, but was arbitrary and capricious. We submit that substance and not form should control.

By making these comments we, of course, do not concede that the engineer had power or authority to declare the forfeiture. If instead of the state engineer a court had been handling the matter it would have afforded to the litigants a full constitutional right to be heard, and to present evidence in support of their contentions. Vital evidence would have included *the matter of actual resumption of use.* The court may well have held that although through ignorance the applicant failed to comply strictly with the statute it should not be deprived of a water right where, as in this case, the water was actually put to use within the required time.

There are some mitigating circumstances which a court may well have found excused the successor of the applicant from strict performance. Crowther Bros. probably did not know that notice of the transfer of the water right should have been given to the state engineer. (There is no express provision of the law requiring this notice.) When inquiry was made of the state engineer by letter (see page 3 above), the state engineer did not send Crowther Bros. the form which provides for verification. See the letter of assistant attorney general dated January 8, 1955, in which it is stated:

> "The blank form above referred to was not sent to you and the 'further information' mentioned in the statute could not be required of you. . . ." (See page 7 of this brief.)

The importance of furnishing an affidavit or a proof form is not stressed in the state engineer's letter quoted above on page 4 of this brief and no statute

is cited. The penalty for failure to comply is also not mentioned in the letter. We believe that under the circumstances the fact of resumption of use of water within the five-year period saved the water right, and the trial court should have ignored the void ruling of the engineer and declared the validity of the water right.

CONCLUSION

The decision of the state engineer declaring a forfeiture of the old Thatcher Mill water right was not only erroneous, but was absolutely void because he had no authority whatever to determine the validity of a vested water right. This was clearly a judicial matter which could have been determined only by a legally constituted court. The statute relating to the filing of actions for review within 60 days has no application here because it provides a remedy only for erroneous rulings on administrative matters within the authority delegated to the engineer. A void decision may be attacked and set aside anytime. The judgment of the district court resting only upon a void decision of the state engineer must be reversed.

Respectfully submitted,

E. J. SKEEN

522 Newhouse Building
Salt Lake City, Utah

Attorney for Plaintiffs and Appellants